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Supreme Court of the United States

October Term, 1976

No. 76-342

OLSON FARMS, INC.

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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No.

OLSON FARMS, INC.

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on July 14, 1976.

CITATIONS TO OPINIONS BELOW

The unreported Memorandum Opinion of the trial judge is printed in Appendix A hereto, infra, page A-1. The Opinion of the Court of Appeals which is not yet published is printed in Appendix B hereto, infra, page B-1. An Order of the Judicial Council of the Tenth Circuit concerning this case decided July 30, 1976, is printed in Appendix C hereto, infra, page C-1.

JURISDICTION

The Judgment of the Circuit Court of Appeals was entered on July 14, 1976, and this Petition for Certiorari

is filed within 90 days of said date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1234(1).

QUESTIONS PRESENTED

1. Whether an appellate court may, by mandamus, order the disqualification of a trial judge under 28 U.S.C. Section 455 (a) after specifically finding that there were no extra-judicial grounds for filing the disqualification motion.

2. Whether an appellate court may order the disqualification of a trial judge on the basis that statements by the trial judge in the course of judicial proceedings when considered in the light of the appellate court's previous experience with the trial judge in other unrelated cases result in a conclusion by the appellate court that there was a reasonable likelihood the cause would not be tried with impartiality.

3. Whether the judicial council of an appellate court may order the disqualification of a trial judge on the basis that statements by the trial judge in the course of judicial proceedings when considered in light of the council's previous experience with the trial judge in other unrelated cases result in a conclusion by the council that there was a reasonable likelihood the cause would not be tried with impartiality.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. Section 144, Bias or Prejudice of Judge

Whenever a party to any proceeding in a District Court makes and files a timely and sufficient Affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The Affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such Affidavit in any case. It shall be accompanied by a Certificate of Counsel of Record stating that it is made in good faith.

28 U.S.C. Section 455(a), Disqualification of Justice, Judge, Magistrate or Referee in Bankruptcy

(a) Any justice, jduge, magistrate or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. Section 32, Judicial Councils

(a) The chief judge of each circuit shall call, at least twice in each year and at such places as he may designate, a Council of the Circuit Judges for the Circuit, in regular active service, at which he shall preside. Each circuit judge, unless excused by the chief judge, shall attend all sessions of the Council.

• • •

(d) Each Judicial Council shall make all necessary Orders for the effective and expeditious administration of the business of the courts within its Circuit. The district judges shall promptly carry into effect all Orders of the Judicial Council.

STATEMENT OF THE CASE

On July 28, 1975, indictments were returned against Petitioner Olson Farms, Inc. as well as against Gilbert T. Cochran, Egg Products Company, Snow White Egg Company and others. The indictment charged the defendants with conspiring to fix egg prices in violation of Section 1 of the Sherman Act, 15 U.S.C. Section 1. On November 24, 1975, the defendants were arraigned. At this time the

trial judge granted the motion of petitioner for a bill of particulars. In granting the motion, the trial judge clearly expressed his philosophy of liberal discovery and stated his intention to grant similar motions for other defendants if such were filed.

Trial of the case was set for February 2, 1976.

On January 16, 1976, further motions for Bills of Particulars were heard and were granted in keeping with the Court's previously stated discovery policy. At this hearing, the defendants also claimed that certain of the previous motions and orders had not been complied with, and, over the objection of the government, the Court ordered the government attorneys fully to comply and in addition, granted other discovery motions.

Following the January 16th hearing the government lawyers asserted that they learned, for the first time, of six resolutions filed with the Utah State Bar directed against Judge Ritter. These resolutions were referred to the Bar's Board of Commissioners for consideration. Mr. Harold Christensen, counsel for Olson Farms, was at that time President of the Utah State Bar. On December 17, 1975, the Bar Commission referred the resolutions to the Bar's Executive Committee for hearings and investigation. Mr. Christensen, as Bar President was Chairman of the Executive Committee. The Executive Committee heard testimony on December 27, 1975, and subsequently voted to recommend to the Commission that it report adversely on four of the six resolutions, take no position on one, and support the remaining. These recommendations were accepted by the Commission.

To give the trial judge proper notice of the resolutions, the Executive Committee directed Mr. Christensen, as Chairman, to deliver the resolutions to Judge Ritter, which Mr. Christensen did.

At the state bar meeting on January 10, 1976, the six anti-Ritter resolutions were considered by the members of the bar. Mr. Christensen presented the recommendation of the Commission. Four of the resolutions were rejected, and two approved.

On January 23, 1976, attorneys for the Government filed a motion to disqualify Judge Ritter. The motion sought disqualification on two grounds: (1) that the trial judge had a personal bias and prejudice in favor of Mr. Christensen; and (2) that the trial judge had a personal bias and prejudice against the antitrust division of the United States Department of Justice.

On January 30, 1976, the Court held a hearing to consider the disqualification question. At that time, Mr. Disharoon, the government attorney who signed the Affidavit in Support of the Government's Motion for Disqualification, was cross-examined by Mr. Christensen. The transcript of the hearing demonstrates that the trial judge was extremely irritated with the government attorneys for having filed the motion, and was apologetic to Mr. Christensen.

The trial judge took the disqualification motion under advisement and the Tenth Circuit Court of Appeals stayed the trial pending his decision on the Motion. On March 29, Judge Ritter issued an Opinion and Order denying the government's disqualification motion. The Opinion held that the Government had not complied with the requirements of either 28 U.S.C. Section 144 or 28 U.S.C. Section 455(a), and that in any event, the facts alleged in the Affidavit were insufficient to support such a motion. Following the filing of a petition by the Government with the Tenth Circuit Court of Appeals for a Writ of Mandamus to disqualify Judge Ritter, the trial judge was then directed to respond to the petition. The Order stated:

> Respondent is directed to specifically answer the Government's contention that irrespective of actual inability to render justice in the case, the relationship between Respondent and Mr. Christensen arising from the proceedings before the Utah Bar Association creates the appearance of inability judiciously to determine the cause within the principles outlined in the Decisions of *Rapp v. Van Deusen,* 351 F.2d 806 (C.A. 3, 1965); *Texaco, Inc. v. Chandler,* 354 F.2d 655 (C.A. 10, 1965), cert. dened., 383 U.S. 936 (1966).

On July 14, 1976 the Tenth Circuit Court ordered that the trial judge be disqualified, not because of any impropriety on the part of either Mr. Christensen or the trial judge but on the express ground that disqualification was a practical action taken "to avoid stress, trouble and complications in the upcoming trial." (Appendix B, page B-12).

In reaching this decision the Tenth Circuit Court considered three issues:

> . . . (1) that Judge Ritter's relationship to Mr. Christensen constitutes actual bias requiring disqualification. They aver that Mr. Christensen acted as Judge Ritter's judge and advocate; (2) . . . the conduct of Judge Ritter at the January 16 and January 30 hearings which they say evidence actual bias in favor of Mr. Christensen and against the government attorneys and in turn against the government; (3) it is contended that the total facts, the action of the Bar Commission of which Mr. Christensen was a member, plus Judge Ritter's alleged deferential attitudes towards Mr. Christensen and his alleged angry attitude toward government counsel creates an appearance of bias violative of 28 U.S.C. Section 455(a). (Appendix B, page B-5).

In its Opinion the Tenth Circuit noted that the Affidavit filed by the Government was "filled with conclusions

and opinion and is peculiarly short on facts." (Appendix B, page B-7).

The opinion rejected the contention that the trial judge was biased in favor of Mr. Christensen, or prejudiced against the Government. As to the third contention, after having considered at length the so-called horse cases[1] in which Judge Ritter was ultimately disqualifed, the Tenth Circuit said:

> The final question, and that which disturbs us most, is whether in the light of the total facts and viewing the future of this case in the light of Section 455(a), there exists reasonable likelihood that the cause will be tried with the impartiality that litigants have a right to expect in a United States District Court. Unfortunately we cannot predict that it will be. Based upon all the facts and considering the broad language of Section 455(a) requiring disqualification in any proceeding "in which his impartiality might reasonably be questioned," it is with reluctance that we conclude that the interest of justice require that the case be tried by another judge . . . (Appendix B, page B-12).

Thus having found no improper conduct on the part of Mr. Christensen and having concluded that the Government had failed to establish any serious misconduct on the part of the trial judge, the court nonetheless ordered the cause tried by another judge, ostensibly reasoning that the statements made by Judge Ritter during the course of judicial proceedings portended another situation similar to the horse cases, and that these circumstances provided an adequate factual base upon which the trial judge's impartiality might reasonably be questioned.

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[1]The "horse cases" concerned a protracted dispute between an Indian tribe and the Government over compensation for burros and horses seized by federal agents on Indian lands. Judge Ritter was the trial judge. *United States v. Hatahaley,* 257 F. 2d 920 (10th Cir. 1958); *Hatahaley v. United States,* 351 U.S. 173 (1956); *United States v. Ritter,* 273 F.2d 30 (10 Cir. 1959), *cert. denied,* 362 U.S. 950 (1960).

REASONS FOR GRANTING THE WRIT

In holding that the trial judge should be disqualified on the basis of statements made during the course of judicial proceedings, the decision of the Circuit Court is in conflict with decisions of this court on the propriety of disqualifying a judge because of matters occurring in judicial proceedings. The decision below also involves an important question of federal law on recusation and the procedures and standards to be used under the very recent amendment of 28 U.S.C. Section 455. Finally, although Section 455(a) was only recently enacted, there is already a conflict among circuit courts as to its interpretation.

1. Since this Court's decision in *Berger v. United States*, 255 U.S. 22 (1921), allegations sufficient to warrant the disqualification of a federal judge have been required to rest on something more than rulings in the case itself. 255 U.S. 22, 32. This Court has also said the bias and prejudice "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966). That the bias or prejudice be extrajudicial in nature has been required regardless of the statutory basis claimed for the disqualification motion. *Davis v. Board of School Commissioners of Mobile County*, 517 F.2d 1044, 1952 (5th Cir. 1975), *rehearing denied*, 521 F.2d 814 (5th Cir. 1975). *See* 2 ALR Fed. 917.

In contrast, the court below in the instant case specifically found that there was no extrajudicial occurrences which would support the recusation action. Instead, the lower court found that in-court statements, and impliedly the trial judge's treatment of counsel for the government after the filing of the motion, when combined with the lower court's experience with the trial judge in other litigation, was a sufficient basis for disqualification under 28 U.S.C.

Section 455(a). Such conclusions represent a marked departure from the requirements for disqualification enunciated by this court in *Berger* and *Grinnell*.

2. Although 28 U.S.C. Section 455(a) was only recently enacted, decisions by United States Court of Appeals are already at variance over the proper interpretation of the statute. In *Davis v. Board of School Commissioners of Mobile County*, 517 F.2d 1044 (5th Cir. 1975), the Fifth Circuit considered Section 455(a) in conjunction with 28 U.S.C. Section 144 (a previously existing disqualification statute) and concluded that the tests for disqualification under Section 455(a) and Section 144 were the same. The Fifth Circuit reasoned the statutes were *in pari materia*, and that both statutes required facts evidencing impartiality involving a party and required that the determination be made on the basis of extrajudicial conduct. 517 F.2d 1044, 1052.

The decision of the lower court in the instant case is in sharp disagreement with *Davis*. The Tenth Circuit found that Section 455(a) contains a "broader standard," and "includes all grounds for disqualification set out in Section 144" as well as allows a "greater flexibility in determining whether disqualification is warranted in particular situations." Also, the Tenth Circuit opinion specifically rejected the *Davis* rationale that bias or prejudice has to be directly in favor or against a party.

In addition, the Tenth Circuit rejected the requirement that the claimed bias or prejudice be extrajudicial in nature in that the lower court considered conduct of the trial judge during the January 16th and January 30th hearings concerning the controversy being litigated and accorded great weight to said hearing in reaching its decision. The Tenth Circuit Court also "considered the so-called horse cases" and reviewed Judge Ritter's judicial conduct in these un-

related cases and relied upon said cases as a barometer for predicting the trial judge's probable future conduct in the instant case. (Appendix B, pages B-10, B-11).

The Tenth Circuit Court's position that the amendment was intended to permit a more liberal standard for disqualification is correct in that the amendment terminated the so-called duty to sit rule, and replaced it with an objective standard. *Lazofsky v. Sommenset Bus Co., Inc.*, 389 F. Supp. 1041, 1044 (E.D.N.Y 1975). The lower court erred, however, in concluding that the substitution of an objective standard for disqualification also was intended to revise the factors to be taken into account in determining whether recusal is necessary.

3. The interpretation of the newly amended recusal statute is an important question of Federal law which must be settled by this Court. In *Parrish v. Board of Commissioners of Alabama State Bar*, 524 F.2d 98 (5th Cir. 1975), the Fifth Circuit en banc delivered six separate opinions as to various problems concerning the applicable standard of application to Sections 144 and 455 of the Judicial Code. The majority opinion in that case stated that a claim of prejudice "must be supported by facts which would raise a reasonable inference of a lack of impartiality on the part of a judge in the context of the issues presented in the particular lawsuit." *Id.* at 104. The dissent, on the other hand, stated:

> It will be noted that language speaks in terms of the judge's impartiality being reasonably "questioned." It does not speak in terms of his partiality being reasonably likely to exist. Moreover, . . . the Committee Report makes clear, it seems to me, that we are dealing with reasonableness of the litigants' belief or fear of the existence of bias rather than the reasonableness of the claim that bias actually exists. *Id.* at 109.

Although specifically rejecting the factual claims presented by the government, the Tenth Circuit Court's decision in the instant case failed to enunciate the standard upon which its decision was based. Instead, throughout its opinion, the lower court emphasized the weak factual basis for the motion. (Appendix B, pages B-8 to B-10). After the lower court specifically found there was no extrajudicial basis for the motion, it nonetheless concluded that the "total facts" warranted recusal. (Appendix B, page B-11).

The lower court previously defined the "total facts" to include the action of the Bar Commission, of which Mr. Christensen was a member, and Judge Ritter's alleged deferential attitude toward Mr. Christensen and his alleged angry attitude toward governmental counsel. (Appendix B, page B-5). Apparently, therefore, the Circuit Court concluded that individual facts, insufficient in themselves to provide a basis for recusal of a federal district judge, could be considered as contributing to the facts necessary to provide a basis upon which to question the judge's impartiality.

4. The action of the judicial council in assigning this criminal case to another judge on the basis of the Circuit Court's decision raises a significant question as to the statutory authority vested in a judicial council. There is little authority for the proposition that a judicial council may "in the interest of justice" remove a federal district judge from a case when there are no specific facts which would permit removal under a disqualification statute. The decisions relied upon by the Tenth Circuit have never been reviewed by this court to consider whether a judicial council is vested with such authority. See *United States v. Ritter*, 273 F.2d 30, 32 (10th Cir. 1959), *cert. denied*, 362 U.S. 950 (1960); *Occidental Petroleum Corp. v. Chandler*,

303 F.2d 55 (10th Cir. 1962), *cert. denied,* 372 U.S. 915 (1962).

5. A further question of importance posed by the judicial council action is whether a judicial council has the authorty under 28 U.S.C. Section 332 to remove a case from a federal district judge after the case has been assigned to the judge and after the judge has been active in the litigation.

There is a substantial question whether the judicial council had authority, under the circumstances, to reassign the criminal case to another judge. If, as the petitioner contends, recusal was inappropriate under 28 U.S.C. Section 455(a), then authority for the action of the judicial council must be derived from the council's statutory authority. The statutory power granted the judicial council, however, does not support the action taken in the instant case. See *Virginia Electric & Power Co. v. Sun Building & Drydock Co.,* 407 F. Supp. 324 (E D.. Vir. 1976); and *Duplan Corp. v. Deering Milliken, Inc.,* 400 F. Supp. 497 (D. S.C. 1975)

CONCLUSION

For the reasons set forth above, a Writ of Ceriorari should issue to review the judgment and opinion of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF UTAH
CENTRAL DIVISION

Case No. Cr 75-76

UNITED STATES OF AMERICA,
Plaintiff.

vs.

COUNTRYSIDE FARMS, INC.;
EGG PRODUCTS, CO.;
OLSON FARMS, INC.;
SNOW WHITE EGG CO.;
R. KENT CHRISTOFFERSON;
GILBERT T. COCHRAN,
Defendants.

Filed March 29, 1976

Defendants are charged by grand jury indictment with violations of Section 1 of the Sherman Act (15 U.S.C. §1). The indictment was returned by the grand jury on July 28, 1975. The defendants pleaded to the indictment on November 24, 1975. The case was set for trial to a jury, to commence February 2, 1976, the Clerk of the Court having given notice of the trial setting to all parties on December 23, 1975.

On November 17, 1975, defendants Olson Farms, Inc. ("Olson") and Gilbert T. Cochran, by their counsel Harold G. Christensen, filed a Motion for a Bill of Particulars pursuant to Rule 7(f), Federal Rules of Criminal Procedure. That motion was heard by the court on November

24, 1975. The Government was ordered to provide to defendants the particulars requested in the motion. Defendants Egg Products Company ("Egg Products"), by its counsel Clark W. Sessions, and Countryside Farms, Inc. ("Countryside") and R. Kent Christofferson, by their counsel Ricardo B. Ferrari, filed motions for a Bill of Particulars on December 3 and 4, 1975, respectively. These motions were heard by the court on December 18, 1975. The Government was ordered to provide to defendants the particulars requested in the motions. The Government thereafter filed a Combined Bill of Particulars that provided certain information, but stated objections to furnishing further information and failed substantially to comply with the court's order.

On December 31, 1975, defendants Countryside and Christofferson, by their counsel, moved under Rule 7(f) for further particulars upon the ground that the Government's Bill of Particulars did not comply with the court's order. Defendants Olson Farms and Cochran, by their counsel, and Egg Products, by its counsel, filed similar motions on January 6 and 13, 1976, respectively. These motions were heard by the court on January 16, 1976, at which time the court granted the motions for further particulars. On January 20, 1976, the court issued its order directing the Government to serve and file a further bill of particulars.

On Friday, January 23, 1976, only ten days before the trial setting in this case and long after the commencement of the term of the court during which this case was to be tried (which term commenced on January 14, 1976), the Government, purportedly "by and through the Antitrust Division of the United States Department of Justice and its attorneys," filed a motion under Sections 144 and 455(a) of the Judicial Code (28 U.S.C. §§144, 455(a))

requesting that the sitting judge declare himself disqualified to preside at the trial of this action or at any further hearings or proceedings. This motion was supported by a nineteen page affidavit of C. Robert Disharoon, who identified himself in the affidavit as counsel of record for the Government, with some 74 pages of exhibits appended thereto. The contents of this affidavit may be summarized briefly:

(1) Mr. Disharoon asserts his belief that the sitting judge has "a personal bias and prejudice in favor of Harold G. Christensen. . . ." (Para. 2)

(2) Mr. Disharoon recites certain alleged conversations between himself and Joseph Novak, immediate past president of the Utah State Bar, and Dean W. Sheffield, Executive Director of the Utah State Bar, respectively, wherein certain information was purportedly conveyed to Mr. Disharoon concerning proceedings of the Utah State Bar Commissioners, their Executive Committee, their President (Mr. Christensen), and the membership of the Bar with respect to several resolutions referring to or proposing that the Bar take positions that might affect the judicial status and office of the sitting judge. Mr. Disharoon claims that as President of the Bar Mr. Christensen participated in deliberations of the Commissioners, the Executive Committee, and the Bar on December 17, 1975, December 27, 1975, January 8, 1976, and January 10, 1976, with respect to these resolutions. (Para's. 3A-3J.) Mr. Disharoon's affidavit does not state any fact relative to Mr. Christensen except that he participated in the deliberations of the Bar and its Commissioners described above in his capacity as President of the Bar. Indeed, Mr. Disharoon's affidavit does not even reflect how Mr. Christensen voted, if at all, as a member of the Board of Bar Commissioners, its Executive Committee, and the Bar itself on the resolutions. Mr. Disharoon's affidavit does establish that Mr. Christen-

sen discharged his duty as President of the Bar to preside at various meetings of the Bar, the Board of Bar Commissioners, and its Executive Committee, and to present to the membership of the Bar the recommendations of the Board of Bar Commissioners on the resolutions. Mr. Disharoon's affidavit further asserts (correctly, as the sitting judge is aware of his own knowledge) that on January 4 or 5, 1976, Mr. Christensen, in his capacity as President of the Bar, personally delivered to the sitting judge two copies of each of the resolutions. Mr. Disharoon's affidavit does not assert that the subject criminal proceeding was discussed by Mr. Christensen and the sitting judge at that or any other time, or that any other event occurred at that time that would tend to prove other than that Mr. Christensen's actions were entirely proper, professional, and in discharge of his duties as President of the Bar. The sitting judge knows of his own knowledge that Mr. Christensen's conduct was entirely proper, professional, and in discharge of his said duties.

(3) Mr. Disharoon asserts that in one hearing on the record and in open court in the course of judicial proceedings in the subject criminal case, the sitting judge, "In affiant's opinion, . . . demonstrated considerable bias and prejudice in favor of Mr. Christensen. . . ." (Para's 3K-3L)

(4) Mr. Disharoon asserts his belief that the sitting judge "has a personal bias and prejudice against the Antitrust Division of the United States Department of Justice." (Para. 4)

(5) Mr. Disharoon recites as the basis for his belief that such bias and prejudice exists no "facts" except events that have occurred in the course of judicial proceedings in the subject and other criminal cases where the sitting judge has made rulings and entered orders contrary to the arguments of the Antitrust Division, including the following:

(a) Refusals to issue orders granting immunity and compelling testimony in grand jury proceedings, which refusals are the subject of a pending Petition for Write of Mandamus filed by the Government in the United States Court of Appeals for the Tenth Circuit;

(b) Comments by the sitting judge concerning the lack of wisdom in issuing indiscriminate immunity orders;

(c) Discharge of a grand jury contrary to the views of certain Government lawyers, resulting in certain publicity that may well have resulted from violations of the secrecy attendant to grant jury proceedings, the contents of which publicity do not appear to the court to be relevant or material to the pending disqualification motion;

(d) Comments of the sitting judge made during reported hearings in the subject criminal proceeding that reflect disagreement with the arguments of certain Government lawyers;

(e) The grant of defendants' original and further motions for bills of particulars in the pending criminal proceedings. (Para's. 5A-5C.)

In addition to such facts (as distinguished from conclusions) as are contained in Mr. Disharoon's affidavit, the court has before it, for such bearing as they may have on the disposition of the pending disqualification motion, the following:

(1) Testimony of Mr. Disharoon relative to the matters treated in his affidavit (Transcript of Hearing, January 30, 1976, pp. 12-60);

(2) Affidavits of Phil Mueller, News Director of KSL-AM Radio, Lowell N. Hawkes, Attorney, Dean W.

Sheffield, Executive Director of the Utah State Bar, and Joseph Novak, immediate past president of the Utah State Bar, all of which were received in evidence after the Government stated it had no objection to their being so received (Transcript of Hearing, January 30, 1976, pp. 60-61). The Mueller and Hawkes affidavits present evidence of the publicity generated by the pending disqualification motion. The Sheffield and Novak affidavits contain information in addition to that set forth in Mr. Disharoon's affidavit concerning Mr. Disharoon's conversations with Mess'rs. Sheffield and Novak. In particular, these affidavits establish that Mr. Christensen was directed by the Executive Committee of the Board of Bar Commissioners to deliver to the sitting judge the resolution described in Mr. Disharoon's affidavit, and that Mr. Christensen's activities as described in Mr. Disharoon's affidavit were proper, regular and lawful, and in conformity with his duties as President of the Bar.

The pending disqualification motion is based on Sections 144 and 455(a) of the Judicial Code. Section 144 provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

There are five elements that must be satisfied by an affidavit to obtain judicial disqualification under Section 144. (1) The affidavit must be timely, that is, filed not less than ten days before the beginning of the term at which the action is to be tried, or there must be a showing of good cause for failure to file it within such time. (2) The affidavit must be made by a *party* to the proceeding. (3) The affidavit must state *facts* sufficient to establish the existence of personal bias or prejudice of the challenged judge. (4) The bias or prejudice must be shown to be either against the moving party or in favor of an *adverse party*. (5) The affidavit must be accompanied by a certificate of *counsel of record* stating that the affidavit is made in good faith.

Section 455(a) provides:

> Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Although this statute, new to the body of federal law respecting judicial disqualification, contains no express requirement that an affidavit filed thereunder be timely, be *made* by a party, or be accompanied by a certificate of good faith executed by counsel of record, it is plain that Congress did not intend to broaden the basis for disqualification to include judicial conduct toward counsel, or to permit counsel to secure a disqualification without establishing *facts* demonstrating that the "impartiality" of the challenged judge "might reasonably be questioned." These issues were fully considered by the Court of Appeals for the Fifth Circuit in *Davis v. Board of School Com'rs of Mobile County*, 517 F.2d 1044, 1052 (5th Cir. 1975):

> "The quoted language, *supra*, in § 455 is new to the federal law of disqualification and we must determine whether Congress intended to overrule the

gloss placed on § 144, and impliedly on § 455, by court decisions that it applies only to conduct which runs against a party and not the lawyer . . . and that disqualification results from extra-judicial conduct rather than from matters arising in a judicial context.

• • •

"We find no suggestion in the legislative history that these decisions were being overruled or in anywise eroded.

• • •

"Construing §§ 144 and 455 in pari marteria we believe that the test is the same under both. We thus hold that an appellate court, in passing on questions of disqualification of the type here presented, should determine the disqualification on the basis of conduct which shows bias or prejudice or lack of impartiality *by focusing on a party rather than counsel. The determination should also be made on the basis of conduct extra-judicial in nature as distinguished from conduct within a judicial context.* This means that we give §§ 144 and 455 the same meaning legally for these purposes, whether for purposes of bias and prejudice or when the impartiality of the judge might reasonably be questioned.

"Here, we have judicial activity toward lawyers without more and the result under §§ 144 and 455, considered separately and together, is that we find no error." *Davis v. Board of School Com'rs of Mobile County,* 517 F.2d 1044, 1052 (5th Cir. 1975) (Emphasis added).

For the reasons set forth below, the court holds that the pending motion to disqualify must be denied because the affidavit of Mr. Disharoon fails to satisfy any of the requirements of Sections 144 and 455(a).

It requires no citation of authority to establish that if there is plainly no basis for granting the disqualification

motion, the sitting judge has a duty to proceed with this case. To do otherwise would be an irresponsible abdication of the judge's duties. This conclusion is more apparent in a two-judge court than in a court having many judges, for disqualification of one judge necessarily means, in the great majority of cases, substitution of one other judge.

Another special consideration merits plain statement. If Mr. Disharoon's affidavit is sufficient to require the sitting judge to recuse himself in this case, it may very well follow that the same judge could be disqualified at the whim of the Antitrust Division in *every* case in which the Division is counsel for the Government, and that the same judge could be disqualified at whim of the opposing party or counsel in *every* case, criminal or civil, in which *Mr. Christensen,* and presumably the law firm of Worsley, Snow & Christensen, may be counsel. Thus, the disqualification of the sitting judge in this case may have far-reaching adverse consequences affecting the administration of justice in this court and giving arbitrary forum-shopping powers to certain lawyers and parties that are patently inconsistent with the purposes of Sections 144 and 455(a) in assuring fair and impartial tribunals.

Under the circumstances that exist in this case, the court is particularly obliged to examine Mr. Disharoon's affidavit for compliance with the requirements of Sections 144 and 455(a), and to resist any temptation to avoid controversy by ordering a disqualification in the absence of a timely and sufficient affidavit that satisfies the statutory standards.

For the following reasons, then, the Motion to Disqualify the Honorable Willis W. Ritter filed January 23, 1976, should be, and it is hereby, denied.

I. *The Disharoon Affidavit Was Not Timely Filed.*

The term of court at which this case was to be tried commenced on January 14, 1976. The affidavit was not filed until January 23, 1976, plainly not within ten days before commencement of the term. The affidavit not only fails to make any showing of good cause for its late filing, but demonstrates on its face that no such showing can be made. Most of the matters treated in paragraphs 4 and 5 of the affidavit occurred long before the beginning of the term and were, of course, known to Mr. Disharoon and his associates when they occurred.

II. *The Disharoon Affidavit Is Not Made by a Party.*

The affidavit does not purport to be made by or on behalf, or under authority, of the United States of America, the party represented by Mr. Disharoon. Rather, the affidavit is made by Mr. Disharoon *personally.* Had Mr. Disharoon been authorized to make the affidavit for and on behalf of the United States, it would have been an elementary matter to so state.

> "When someone other than the party attempts to make the affidavit for the party, such as in the case of a corporation, there must be a showing that such person has authority to make such affidavit." *United States v. 16,000 Acres of Land,* 49 F Supp. 645, 652 (D. Kan. 1942).

Because the affidavit plainly is not made by the party, the United States, it is insufficient as a matter of law and must be rejected. *United States ex rel. Wilson v. Coughlin,* 472 F.2d 100, 104 (7th Cir. 1973); *Giebe v. Pance,* 431 F.2d 942, 943 (9th Cir. 1970).

III. *The Disharoon Affidavit Does Not State Facts That Establish a Bias or Prejudice of the Sitting Judge.*

The contents of the Disharoon affidavit are summarized above in this opinion. The "facts" stated in the affidavit simply and plainly do not establish the existence of the bias and prejudice that Mr. Disharoon states, by way of conclusion and not fact, he believes to exist. Moreover, to the extent the "facts" stated relate to occurrences in the course of judicial proceedings, they are irrelevant and immaterial, and will not serve as "sufficient" under the statute. *United States v. Grinell Corp.,* 384 U.S. 563, 583 (1966); *Berger v. United States,* 255 U.S. 22, 36 (1921); *Davis v. Board of School Com'rs of Mobile County, supra; Palmer v. United States,* 249 F.2d 8 (10th Cir. 1957), *cert. denied,* 356 U.S. 914 (1958); *Inland Freight Lines v. United States,* 202 F.2d 169, 171-72 (10th Cir. 1953); *United States v. 16,000 Acres of Land, supra.* All of the claimed "facts" thought by Mr. Disharoon to demonstrate prejudice against him and his fellow lawyers are in this category, and so must be disregarded in any event. Were these "facts" to be considered, however, they would be palpably insufficient to establish the claimed prejudice.

Insofar as the affidavit purports to state "facts" relative to the activities of Mr. Christensen, and the alleged bias of the sitting judge in his favor, the affidavit is based entirely on hearsay and speculation. Although an affidavit under Sections 144 and 455(a) may be made on information and belief, see *Berger v. Unted States, supra,* the hearsay and purely superlative contents of the affidavit as to Mr. Christensen render it insufficient in that it fails to state "facts" that are probative in establishing the claimed bias and prejudice. See *Hodgson v. Liquor Salesmen's Union Local No. 2,* 444 F.2d 1344 (2d Cir. 1972); *United States v. Devlin,* 284 F. Supp. 477 (D. Conn. 1968).

The "facts" asserted to establish prejudice in favor of Mr. Christensen are equally insufficient to establish such prejudice. So far as Mr. Disharoon's affidavit shows, Mr. Christensen's actions were, and the court hereby finds them to have been, proper, professional, and in conformity with the highest standards of conduct befitting the office of President of the Utah State Bar. Such conduct creates no prejudice. The court expects all lawyers appearing before it or otherwise acting as officers of the court so to conduct themselves. The great majority of members of the bar of this court do so.

IV. *The Disharoon Affidavit Fails to Establish Bias or Prejudice in Favor of or Against a Party.*

The affidavit has already been found to be insufficient in failing to establish *any* bias or prejudice. If it were not plainly insufficient on that ground, however, it is insufficient because any showing of prejudice relates only to *counsel* and not any *party*. To satisfy the requirements of Section 144, the affidavit must show prejudice as to a party, and not counsel. *United States v. 16,000 Acres of Land, supra.* The same requirement must be satisfied under Section 455(a) *Davis v. Board of School Com'rs of Mobile County, supra.* The potential for abuse in any other rule is plain in this case, where a disqualification has widespread implications for a multitude of other cases where the same lawyers are counsel, as noted above.

Notably, the Disharoon affidavit fails even to assert any prejudice affecting a party. Mr. Disharoon only claims prejudice in favor of Mr. Christensen, counsel for one defendant, and against the Antitrust Division rather than the United States itself.

Because the affidavit fails to establish, or even claim bias or prejudice as to a party, it is insufficient as a matter of law and must be rejected.

V. *The Certificate of Good Faith Accompanying the Disharoon Affidavit is Insufficient.*

Section 144 requires a certificate of good faith by a member of the bar of this court. *Ormento v. United States,* 328 F. Supp. 246, 261 (S.D.N.Y. 1971); *United States v. Gilboy,* 162 F. Supp. 384, 391 (M.D. Pa. 1958); see *United States v. Onan,* 190 F.2d 1, 6 (8th Cir.), *cert, denied,* 342 U.S. 869 (1951); *Mitchell v. United States,* 126 F.2d 550, 552 (10th Cir.), *cert. denied,* 316 U.S. 702 (1942). The certificate of good faith in this proceeding was made by Mr. Spratling of the Antitrust Division from San Francisco, who is not a member of the bar of this court. A certificate of good faith could have been made by Ramon Child, United States Attorney for the District of Utah, or any of his assistants, all of whom are members of the bar of this court. The absence of a certificate from one of these lawyers is compelling. We are not told whether any of them were asked to make a certificate or, if they were, why they refused. The certificate filed in this proceeding does not satisfy the salutary purposes of the statutorily-required certificate of good faith.

The foregoing insufficiencies of the Disharoon affidavit under Section 144 render the affidavit equally inadequate as a basis for disqualification under Section 455(a). *Davis v. Board of School Com'rs of Mobile County, supra.*

The foregoing constitutes the findings of fact, conclusions of law, and order of the court on the subject Motion to Disqualify.

The trial of this action having been stayed by Order of the Court of Appeals for the Tenth Circuit dated January 30, 1976, until the further order of that Court, it is hereby ordered that a duly-certified copy of this Opinion

be transmitted by the Clerk of this court to the Clerk of the Court of Appeals for the Tenth Circuit, and that further proceedings, if any, in this action other than trial shall be set regularly on the calendar as required for disposition, and that trial of this action be stayed pending the further order of the Court of Appeals for the Tenth Circuit.

Entered at Salt Lake City, Utah this 29 day of March, 1976.

WILLIS W. RITTER, Chief Judge

APPENDIX B

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 76-1248

UNITED STATES OF AMERICA,
Petitioner,

v.

HONORABLE WILLIS W. RITTER,
CHIEF JUDGE OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF UTAH,
Respondent.

Filed July 14, 1976

PER CURIAM.

This is a mandamus petition filed by the Antitrust Division of the Department of Justice seeking to oust Chief Judge Willis Ritter, United States District Judge for the District of Utah, as the trial judge in a criminal antitrust action, *United States v. Countryside Farms, Inc., et al.*, Crim. No. 75-76, which cause is awaiting trial in the mentioned court.

The indictment was returned July 28, 1975. It charged the four corporate and two individual defendants with conspiring to fix egg prices in violation of Section 1 of the Sherman Act, 15 U.S.C. Section 1. Arraignment was had on November 24, 1975, and on this occasion Judge Ritter heard the motions for bills of particulars on behalf of some of the defendants and granted them. At that relatively early time he clearly expressed his intention to grant simi-

lar motions of the other defendants as soon as the same were filed.[1]

On January 16, 1972, further motions for bills of particulars were heard and these were granted in accordance with the previous announcement. It was then claimed by the defendants that certain of the motions and orders had not been complied with, requiring further bills of particulars, and over the objection of the government attorneys the court ordered the government to satisfy the further requests; the court granted other discovery motions.

In the January 16 session, government attorneys claim that Judge Ritter's disposition toward the government changed. About this time the government lawyers assert that they learned of resolutions presented to the Utah Bar Association pertaining to Judge Ritter. These had originally been proposed at the June meeting of the Utah Bar June 20-21, 1975. There were a total of five such resolutions.[2] The resolutions were referred to the Bar's Board of Commissioners of which Mr. Harold Christensen, attorney

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[1]THE COURT: I am going to sign this one (Olson Farm's motion for bill of particulars), and as they come in, I am going to sign them and give these people the information they need to prepare for trial. Supp. Ex. at 14.

[2]Resolution A sought to have the United States House of Representatives investigate the appropriateness of instituting impeachment proceedings against Judge Ritter;

Resolution B sought to have the Tenth Circuit's Judicial Council certify the disability of Judge Ritter pursuant to 28 U.S.C. Section 372;

Resolution C sought the repeal of a grandfather clause which has enabled Judge Ritter to remain Chief Judge for the District of Utah even though he has passed the retirement age of 70;

Resolution D sought approval for an alternative to impeachment as a means of removing a disabled federal judge;

Resolution E sought approval of a law giving litigants in federal courts one preemptory challenge of the judge assigned to hear their case.

Subsequent to the proposal of these resolutions, yet another one was proposed. This resolution, variously called the "Hansen Resolution" or "Resolution No. 1" sought a petition to the Tenth Circuit Judicial Council requesting that Judge Ritter's cases be taken from him.

for Olson Farms,[2a] was chairman inasmuch as he was also president of the State Bar Association.

On December 17, 1975, the Commission referred the resolutions to the Executive Committee for hearings and investigation. This was a three-member committee of which Mr. Christensen as bar president was chairman. This committee heard testimony on December 27, 1975, and following this it voted to recommend to the Commission that it report adversely on Resolutions A, B, E, and No. 1, take no position on Resolution C, and to support Resolution D. The Executive Committee recommendtions were unanimous except for a divided vote on Resolution E.

The Committee also decided on the December 27 occasion to make the resolutions available to Judge Ritter, and approximately a week later Mr. Christensen, in accordance with the Committee's direction, delivered these to the judge. There is no evidence whatever that any impropriety occurred in connection with this delivery.

The Bar Commission accepted the recommendations of the Executive Committee. At the state bar meeting on January 10, 1976, the six anti-Ritter resolutions described above were considered. Mr. Christensen in each instance gave the report of the Commission recommendation. Resolution No. 1 was tabled on a voice vote; Resolutions A, B, and E were defeated in a secret ballot; Resolutions C and D were approved on a secret ballot.

The petition seeking to disqualify was filed on January 23, 1976. The trial in the criminal antitrust case was then set for February 2, 1976, so the government requested the judge to rule quickly on his disqualification, but as of

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[2a]Olson Farms is one of the defendants in the subject criminal case.

January 29 he had not yet ruled, so the government applied to this court for an extraordinary writ requiring him to rule at once. Thereupon, he set the matter down on January 29, for a hearing on January 30.

The government contends that at the January 16 hearing the judge showed bias in granting all of the motions for bills of particulars on behalf of the defendants and in treating counsel for the government with curtness and sarcasm and in contrast treating Mr. Christensen with great deference. In Appendix I, attached hereto, are some of the statements which are relied on.

The January 30 hearing is also relied upon as showing bias on the part of Judge Ritter. They say that the judge sought out Mr. Christensen's preference as to the order of proceedings and allowed him to cross-examine Mr. Disharoon, the government attorney who signed the affidavit of disqualification. They also point to the fact that at the end of the hearing the judge expressed dismay as to the treatment of Mr. Christensen, characterizing it as "the defamation, holding up to hatred and ridicule and contempt of Mr. Christensen." The judge then made a very deferential apology to Mr. Christensen as follows:

> My personal preference is [to continue with trial as scheduled] if it doesn't have repercussions against Mr. Christensen, as well as me — I can get along with them — but I don't want to do anything here that reflects upon Mr. Christensen any further and I certainly don't want to add fuel to the flames of the so-called media involving Mr. Christensen. If they leave him out of it and just shoot at me, why fine, but when they involve a fine, honorable, decent, high-principled man of the bar like Mr. Christensen, I think it's an outrage. App. 157-58.

Inasmuch as the disqualification motion was not decided immediately, this court stayed the trial; then on

March 29, 1976, Judge Ritter issued an opinion and order denying the government's disqualification motion. The opinion held that there had been a failure to comply with a number of the technical requirements of 28 U.S.C. Section 144 and 28 U.S.C. Section 455(a). It was also adjudged that the facts alleged in the affidavit were inadequate.

The Department of Justice contends 1) that Judge Ritter's relationship to Mr. Christensen constitutes actual bias requiring disqualification. They aver that Mr. Christensen acted as Judge Ritter's judge and advocate; 2) also relied on is the conduct of Judge Ritter at the January 16 and January 30 hearings which they say evidences actual bias in favor of Mr. Christensen and against the government attorneys and in turn against the government; 3) it is contended that the total facts, the action of the Bar Commission of which Mr. Christensen was a member, plus Judge Ritter's alleged deferential attitude toward Mr. Christensen and his alleged angry attitude toward government counsel create an appearance of bias violative of 28 U.S.C. Section 455(a).

I.

The government predicates its petition on 28 U.S.C. Sections 144, 455(a). The former allows a party to request disqualification of a district judge when he has a personal bias or prejudice either against him or in favor of any adverse party. It also prescribes procedure.[3] The filing of

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[3] 28 U.S.C. Section 144 states:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for

the affidavit does not bring about the disqualification. The trial court determines its sufficiency. The review is, however, restricted to its legal sufficiency and does not include the truth of the allegations.[4] There must be facts, however, to establish personal bias. Section 455(a) is broader. It applied to any judge and includes that he "shall disqualify himself in any proceeding in which his impartiality might be reasonably questioned." Prior to the 1974 revision, Section 455 read:

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

Congress enacted the revision to make the statute conform to the Code of Judicial Conduct, 119 Cong. Rec. 33029 (1973) (remarks of Senator Burdick) as well as to "broaden and clarify the grounds for disqualification," 119 Cong. Rec. 33029 (1973), and to substitute an objective test of reasonableness for the subjective test of the former Section 455. Under the broader standard of revised Section 455(a), disqualification is appropriate not only where there is actual or apparent bias or prejudice, but also when the circumstances are such that the judge's "impartiality might be reasonably questioned." *See* 13 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction, Section 3549. Thus, the grounds for disqualification set out in Section 144

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the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

[4] *See* Berger v. United States, 255 U.S. 22, 34-36 (1921).

—"personal bias or prejudice either against [a party] or in favor of any adverse party"—are included in Section 455. Moreover, the language of Section 455(a) allows a greater flexibility in determining whether disqualification is warranted in particular situations. 13 Wright, Miller & Cooper, Section 3542.

In *Davis v. Board of School Commissioners of Mobile County,* 517 F.2d 1044 (5th Cir. 1975), *cert. denied,* 44 L.W. 3589 (1976), it was held that the revised Section 455 did not require disqualification where bias in favor of or against an attorney, as opposed to a party, is alleged. We do not believe, however, that this is strictly true, for bias in favor of or against an attorney can certainly result in bias toward the party. Thus, if a judge is biased in favor of an attorney, his impartiality might reasonably be questioned in relationship to the party. In our opinion the only issue presented is legal sufficiency of the affidavit. Unfortunately for the government, however, the affidavit is filled with conclusions and opinion and is peculiarly short on facts.

II.

WHETHER THE GOVERNMENT HAS ESTABLISHED ACTUAL BIAS

In support of its contention that actual bias existed against the government and in favor of the defendants in the subject antitrust litigation, the government relies, first, on the fact that attorney Christensen, counsel for one of the defendants in the case and president of the Utah Bar Association, presided over the Executive Committee and the Commission which considered six resolutions which were so-called anti-Judge Ritter. Two of these, as we noted above, pertained to recommended impeachment and disability proceedings. These were ultimately rejected by

the Commission at its midyear meeting. The government also points specifically to the fact that Christensen delivered copies of the resolutions to Judge Ritter.

The ultimate contention of the government is that Christensen's activity constituted advocacy on his part on behalf of Judge Ritter. This, according to the further argument of the government, creates what amounts to a per se breach of ethics within the rule that the presence of an attorney for the judge who is also an attorney for a client in the subject litigation requires the ousting of the judge from the litigation. *Rapp v. Van Dusen,* 350 F.2d 806 (3d Cir. 1965) and *Texaco, Inc. v. Chandler,* 354 F.2d 655 (10th Cir. 1965), cert. denied, 383 U.S. 936 (1966).

The question is whether Christensen was the judge's attorney. The answer is that he was not Judge Ritter's attorney in any sense. Christensen acted in his capacity as president of the Bar Association. There was no showing that Christensen ever said anything, in these proceedings before the Commission, which were embodied in a report to the membership. Nor does the record reveal advocacy. Christensen merely read the Commission report. In any event, no one could ever accuse Judge Ritter of being in league with the Utah Bar Association, and it is impossible to believe that the membership of the Bar Association voted against the resolutions in order to enhance Mr. Christensen's standing with Judge Ritter. Therefore, we reject the proposition that Christensen was Ritter's lawyer in any sense. We hold this to be an unfounded accusation.

The government's second *contention* is that in subsequent hearings Ritter favored the position of the defendants and was caustic and curt toward government counsel; that he repeatedly prevented them from explaining their position, while at the same time he was deferential to Christensen. This is substantially true and correct.

As to the January 16 proceedings, the unkindness of the judge toward the government arose incident to the judge's rulings on motions of the defendants for bills of particulars. This could not have had anything whatever to do with the proceedings of the Bar Association because on earlier occasions Judge Ritter had granted all of the requests of the defendants for factual information as a part of discovery efforts. At that time, he stated that his position was to grant such requests. Accordingly, there was a lack of ground for surprise when he granted these demands at the January 16 hearing.

At the January 30 hearing the government had requested that Judge Ritter recuse himself. The latter reacted in characteristic manner that this effort impugned his integrity and also that of attorney Christensen. At the January 30 hearing Judge Ritter was indeed caustic and overbearing toward counsel for the government, and part of this no doubt resulted from the filing of the motions demanding that he disqualify himself.

We have examined the colloquy between judge and counsel during these proceedings and it cannot be said that the attitudes displayed could in and of themselves demonstrate prejudice. It might be added that such displays are not infrequent or uncommon. While we do not condone them, they do not invariably evidence bias or prejudice against a party. Sometimes, however, they might foretell injudicious and partisan conduct at trial. Even viewing the facts in their totality, we continue to face a weak factual presentation. There is no indication that Christensen acted unfairly or unethically. There is no bias to be gleaned from Judge Ritter's ruling in favor of the defendants; these rulings were in accordance with the prior ruling which preceded the problem of the resolutions.

The only other facts have to do with Judge Ritter's attitude toward the attorneys for the government at the January 16 and January 30 hearings. The judge was disagreeable to the lawyers and at the same time was friendly and apologetic to Mr. Christensen.

III.

WHETHER THE TOTAL FACTS DICTATE THE GRANTING OF RELIEF

We have fully considered the so-called horse cases. *United States v. Hatahaley,* 257 F.2d 920 (10th Cir. 1958) together with *Hatahley v. United States,* 351 U.S. 173 (1956) and *United States v. Ritter,* 273 F.2d 30 (10th Cir. 1959), *cert. denied,* 362 U.S. 950 (1960). Chief Judge Ritter was the trial judge in all of them. Generally, this was a suit by Navajo Indians under the Federal Tort Claims Act for losses of horses and burros which were seized by the United States agents on Indian lands. Judge Ritter tried the case and awarded all of the damages prayed for, although there was a lack of proof of damages. The original judgment was appealed to this court and was reviewed in 220 F.2d 666 (10th Cir. 1955), rev'd in part, aff'd in part, 351 U.S. 173 (1956). In our original opinion we reversed on statutory grounds which are not relevant to our present problem. We said there that the case had been tried in an atmosphere of "maximum emotion" and a "minimum of judicial impartiality." When the Supreme Court reviewed this it remanded the case for reconsideration for damages. The Supreme Court did not endorse this court's criticism of the atmosphere of the case. In a footnote it expressed the opinion that the judge's findings were not impaired. The cause was retried and again came before this court, 257 F.2d 920 (10th Cir.), *cert. denied,* 358 U.S. 899 (1958). On that occasion the cause was reversed again because of

the excessiveness of the damages, and in the course of the opinion it was suggested that Judge Ritter recuse himself because it was said that he was unable to give the calm and impartial consideration necessary for a fair disposition. This time the Supreme Court denied certiorari. *See* 358 C.S. 899 (1958). That was not the end of the matter. The government applied for an order ousting Judge Ritter from the case and ordering that it be tried by another judge. This court then held in 273 F.2d 30, 32 that in view of the whole record, it was convinced that the United States would be unable to obtain a fair and impartial trial before the then presiding judge and that the proper administration of justice demanded that further proceedings be before another judge. It was pointed out that Judge Ritter had not heeded the court's suggestion that he recuse himself. An order was essential.

We have held that the government has failed to prove impropriety on the part of Mr. Christensen and that the government has failed to establish serious misconduct on the part of the presiding judge. It remains, however, for this court to consider the fact that a criminal prosecution is pending. We must not only view carefully and with objectivity the facts presented, we must consider the question whether within the words of Section 455(a), *supra,* the judge's impartiality might reasonably be questioned.

The final question, and that which disturbs us most, is whether in the light of the total facts and viewing the future of this case in the light of Section 455(a), there exists reasonable likelihood that the cause will be tried with the impartiality that litigants have a right to expect in a United States district court. Unfortunately we cannot predict that it will be. Based upon all of the facts and considering the broad language of Section 455(a) requiring disqualification in any proceeding "in which his imparti-

ality might reasonably be questioned," it is with reluctance that we conclude that the interests of justice require that the cause be tried by another judge, a judge from outside the district, since we are mindful that Judge Anderson presided at the companion trial in the civil action, which grows out of the same factual transaction or transactions. This action is not to be construed as questioning either the integrity or sincerity of the judge. It is a practical action which seeks to avoid stress, trouble and complications in the upcoming trial.

Accordingly, it is so ordered.

The panel is authorized to state that the other members of this court have considered the above and foregoing opinion. The members approve the statements made and the action taken by the panel, as shown in the foregoing opinion.

APPENDIX I

The government cites Judge Ritter's response to government counsel Spratling's attempt to explain the government's position on the further particulars:

> THE COURT: Let's not have any conversation. Jawbone is not permitted in this courtroom. You fellows from San Francisco might as well find that out now. Now Mr. Christensen, I interrupted you before you finished. App. at 52.

The government also points to the following colloquies:

> MR. SPRATLING: Your Honor; first of all I would like to briefly tell you some of the problems involved in responding to your order.
>
> THE COURT: I don't want to hear any problems at all. I want you to deliver those documents

> and deliver that information ten days from now air express courier. App. at 64.
>
> MR. FERRARI (defense counsel): Your Honor, the government to date has refused to state the specific acts they intend to prove. We cannot commit ourselves to a limited and specific set of exhibits until we know what we are charged with.
>
> MR. SPRATLING: Your Honor, that is simply not true.
>
> THE COURT: Well, it may not be true but it ain't simple by any means.
>
> MR. SPRATLING: Well, it's not true, your Honor. Your Honor, we have provided a bill of particulars which contains 500 particulars of the acts charged.
>
> THE COURT: Well, I am not going to listen to that kind of conversation. Like my old Model "T" Ford, I run out of gas on any conversation that doesn't specifically and materially and relevantly refer to the discussion. • • • App. at 65.66.

In arguing why certain correspondence should not be discoverable by the defendants, government counsel concluded his argument, "• • • we are extremely concerned that it will curtail the vigorous enforcement of the antitrust laws." The Court responded, "Well, isn't that too damn bad. I am not so sure I understand what the correspondence is." App. at 56.

APPENDIX C

Order of the Judicial Council of the Tenth Circuit

JUDICIAL COUNCIL OF THE TENTH CIRCUIT

No. 76-1248

IN THE MATTER OF

UNITED STATES OF AMERICA,
Petitioner,

vs.

HONORABLE WILLIS W. RITTER,
CHIEF JUDGE OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH,
Respondent.

Filed July 30, 1976

The hearing panel who considered the captioned matter upon the record and before whom the matter was orally argued and submitted to this Court, namely, The Honorable Robert H. McWilliams, Circuit Judge, The Honorable Jean S. Breitenstein, Senior Judge, and The Honorable William E. Doyle, Circuit Judge, have referred this cause to the Judicial Council for the Tenth Circuit for its consideration.

On the basis of the petitions, answers, exhibits and replies in the record and the opinion of the Court, the Judicial Council for the Tenth Circuit has determined to take administrative action to control proceedings in the United States District Court for the District of Utah in connection with pending cause no. 75-76 entitled *United States of America vs. Countryside Farms, Inc., et al.*

On the basis of its examination of the record, the Judicial Council has concluded that there is a reasonable likelihood that the cause may not be tried with the impartiality that litigants have a right to expect in a United States District Court and have determined that the interests of justice require that the cause be tried by a judge from outside the United States District Court for the District of Utah.

It is therefore ordered by the Judicial Council for the Tenth Circuit, all judges participating, that a judge outside the District of Utah be appointed to conduct further proceedings in, and including the trial of, the cause pending in that District entitled *United States of America vs. Countryside Farms, Inc., et al,* No. 75-76.

Entered at Denver, Colorado, this 30th day of July, 1976, by Order of the Judicial Council for the Tenth Circuit.

DAVID T. LEWIS

Chief Judge

Supreme Court, U. S.
FILED
OCT 20 1976
MICHAEL RODAK, JR., CLERK

No. 76-342

In the Supreme Court of the United States

OCTOBER TERM, 1976

OLSON FARMS, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-342

OLSON FARMS, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the district court (Pet. App. A-1 to A-14) and the court of appeals (Pet. App. B-1 to B-13) are not yet reported. The order of the Judicial Council of the Tenth Circuit (Pet. App. C-1 to C-2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 1976. The order of the Judicial Council was filed on July 30, 1976. The petition for a writ of certiorari was filed on September 3, 1976. Because this is a petition to review the issuance of a writ of mandamus requiring a judge to recuse himself in a criminal case, Rule 22(2) of the Rules of this Court applies, and the petition is out of

time.[1] Petitioner invokes this Court's jurisdiction under 28 U.S.C. 1254(1).[2]

QUESTIONS PRESENTED

1. Whether petitioner may seek review in its own name of a writ of mandamus removing a district judge from further proceedings in a criminal case in which it is a defendant.

2. Whether this Court has jurisdiction to review by writ of certiorari an order of a circuit judicial council removing a judge from a case.

3. Whether the court of appeals and the judicial council properly removed the district judge after concluding that his impartiality might reasonably be questioned.

STATUTES INVOLVED

28 U.S.C. 144, 332, and 455(a) are set out at Pet. 2-3.

STATEMENT

1. An indictment filed in the United States District Court for the District of Utah on July 28, 1975, charged that six defendants, including petitioner, had engaged in a criminal combination and conspiracy to fix egg prices, in violation of Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1. The defendants were arraigned on November 24, 1975, before Chief Judge Willis W. Ritter, who granted certain defendants' motions for

[1]The court of appeals stayed issuance of its mandate on condition that a petition for certiorari be filed by September 3, 1976. This stay did not, however, extend the time within which to file a petition. Petitioner could have filed a timely petition within the stay granted by the court of appeals, but only by seeking an extension of time in this Court.

[2]Petitioner refers (Pet. 2) to "28 U.S.C. Section 1234(1)," but that is apparently a printer's error.

bills of particulars, assigned the case to himself for trial, and set February 2, 1976, as the first date of trial.

Petitioner was represented at the hearing by Harold G. Christensen, then president of the Utah State Bar. At the annual meeting of the Utah State Bar on June 20-21, 1975, several resolutions either directly or indirectly concerning Judge Ritter had been introduced. One of the resolutions called for the State Bar to recommend to the United States House of Representatives that it investigate the appropriateness of starting impeachment proceedings against Judge Ritter; another recommended that the Judicial Council of the Tenth Circuit (the "Judicial Council") investigate the judge's ability efficiently to discharge his duties (Pet. App. B-2 n. 2). The resolutions were referred to the Bar Commission, of which Mr. Christensen was a member and presiding officer (Pet. App. B-2 to B-3).

On December 17, 1975, the Commission referred the resolutions to the Executive Committee, a three-man body of which Mr. Christensen was chairman (Pet. App. B-3). On December 27, 1975, this committee held a hearing and unanimously voted to recommend that the Bar Commission oppose the impeachment and disability resolutions (*ibid.*).[3] A week later Mr. Christensen, at the request of the committee, personally delivered copies of the proposed resolutions to Judge Ritter (*ibid.*). On

[3]The Executive Committee also opposed two other resolutions recommending action adverse to Judge Ritter (Pet. App. B-3). The committee took no position on a resolution calling for repeal of a "grandfather" clause enabling Judge Ritter to sit as Chief Judge of the District despite being over the age of 70 (*ibid.*). See 28 U.S.C. 136 and Act of August 6, 1958, Section 3, 72 Stat. 497. The committee endorsed a resolution approving legislation that would provide an alternative to impeachment as a means of removing a judge not exercising good behavior (Pet. App. B-3).

January 8, 1976, the Bar Commission unanimously adopted the Executive Committee's recommendations (*ibid.*). On January 10, 1976, at the mid-year meeting of the State Bar, Mr. Christensen presented the Commission's recommendations; the State Bar defeated the impeachment and disability resolutions by votes of 100 to 71 and 106 to 64 (*ibid.*; App. 40).[4]

On January 16, 1976, Judge Ritter held a motions session. The defendants, with Mr. Christensen as chief spokesman, sought further bills of particulars, asserting that the government had not complied with earlier requests. Judge Ritter, in granting the defendants' requests, treated Mr. Christensen with deference while curtly and caustically cutting off government counsel before he could explain his position (Pet. App. B-8).

2. After this motions session government counsel learned of the State Bar impeachment and disability resolutions against Judge Ritter, and of Mr. Christensen's role in the State Bar's defeat of those resolutions (Pet. App. B-2; App. 76-77).[5]

On January 23, 1976, the United States requested Judge Ritter to disqualify himself, pursuant to 28 U.S.C. 144 and 455(a) (App. 1-2). The motion, accompanied by a lengthy affidavit (App. 3-19), stated that there was reason to believe that Judge Ritter was biased in favor of Mr. Christensen and biased against the Antitrust Division of the United States Department of Justice. The government also asked Judge Ritter to rule promptly and to stay further proceedings pending his ruling (App. 2).

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[4]"App." refers to the appendix in the court of appeals.

[5]The United States Attorney for the District of Utah had been aware of the resolutions, but he had taken no part in the prosecution of the case and had not informed the lawyers handling the case of the resolutions.

Judge Ritter did not rule on the motion, did not indicate when he would rule, and did not stay the start of the trial. On January 29, 1976, the United States, fearful that Judge Ritter would start the trial on February 2 without ruling on the motion, petitioned for a writ of mandamus from the court of appeals to compel the judge to rule promptly (Pet. App. B-4).[6] Immediately upon receiving notice of the petition, Judge Ritter scheduled a hearing on the government's motion for the afternoon of January 30, 1976 (*ibid.*).[7]

Judge Ritter began that hearing by denying the government an opportunity to be heard on its motion (App. 81) —although the judge himself had listed it as the first item of business (App. 78)—and by asking Mr. Christensen for his preference on the order of proceedings. When Mr. Christensen declined to express a preference, Judge Ritter allowed the government to argue the issue of disqualification (Pet. App. B-4; App. 81-88). After ruling against the government's argument for disqualification under 28 U.S.C. 144,[8] he ordered the government attorney who had sworn to the affidavit attached to the disqualification motion to take the stand for cross-examination by Mr. Christensen (Pet. App. B-4). Judge Ritter

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[6]In a recent criminal trial, *United States* v. *Lansing and Farley*, D. Utah, Cr. No. 75-120, Judge Ritter had refused to consider pretrial motions prior to trial. The court of appeals issued a writ of mandamus directing the judge to rule on the motions prior to trial. *United States* v. *Ritter*, C.A. 10, No. 76-1011, mandamus issued May 20, 1976.

The prosecution's concern in this case, and others like it, is that a disqualification ruling during the course of a criminal trial is effectively unreviewable.

[7]He also scheduled for hearing at the same time defendants' motion to cross-examine the government's affiant, to dismiss the indictment, and to suppress evidence (App. 78).

[8]Judge Ritter withdrew this ruling after learning that the clerk of the court of appeals wished to be informed of district court proceedings (App. 88).

then demanded that the chief government attorney, Gary R. Spratling, take the stand to testify concerning publicity attendant upon the judge's dismissal of the grand jury that indicted the defendants and the filing of the disqualification motion (App. 147-157).[9] The judge then "made a very deferential apology to Mr. Christensen" (Pet. App. B-4) and told the government attorney that "[n]ow you have only begun to see what I am going to do about this, Mr. Spratling" (App. 156).

At this point Judge Ritter, without ruling on disqualification or other pending motions, adjourned the hearing to Saturday morning. The court of appeals stayed the trial (Pet. App. B-4).

3. On March 29, 1976, Judge Ritter issued an opinion and order denying the government's motion for disqualification (Pet. App. A-1 to A-14). Although the opinion set

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[9]On December 4, 1975, Judge Ritter, over the objection of the prosecutors and of the grand jurors themselves, dismissed before completion of its term the grand jury that had indicted the defendants (App. 71). The foreman and another member of the grand jury were quoted in the press and on television as being very disappointed that Judge Ritter had blocked the grand jury from finishing its investigation (App. 71). The prosecutors, however, did not encourage the grand jurors to make these statements, and they were not responsible for the publicity given to the disqualification motion (App. 148, 118).

The United States subsequently asked Judge Ritter to convene a new grand jury; when he declined to act, it petitioned for a writ of mandamus directing him to convene a new grand jury and not improperly to interfere with its functioning. *United States* v. *Ritter*, C.A. 10, No. 76-1331. On April 29, 1976, the court, noting that Judge Ritter had meanwhile convened a grand jury, retained jurisdiction over Judge Ritter's supervision of the grand jury. It has now issued a writ of mandamus directing Judge Ritter to discontinue certain unreasonable restraints he had imposed on the appearance of counsel before the grand jury. *United States* v. *Ritter*, C.A. 10, No. 76-1331, mandamus issued September 10, 1976.

out several hypertechnical reasons for denying the motion, its major premise was that disqualification under 28 U.S.C. 455(a) is available only when all the requirements of Section 144 also have been met, and that none of those requirements had been met (Pet. App. A-6 to A-13).

4. The United States petitioned for a writ of mandamus to disqualify Judge Ritter.[10] The court of appeals, in a unanimous *en banc* opinion, removed Judge Ritter under 28 U.S.C. 455(a).[11] The court held that "in the light of the total facts" there was not a reasonable likelihood that the case would be tried "with the impartiality that litigants have a right to expect in a United States district court" (Pet. App. B-11).

The court noted the resolutions involving Judge Ritter and Mr. Christensen's role in the State Bar's handling of them (Pet. App. B-2 to B-3, B-7 to B-8). Although it held that Mr. Christensen's conduct in the matter was not improper, it described Judge Ritter's attitude toward Mr. Christensen after the defeat of the resolutions as "friendly," "deferential," and even "apologetic" (Pet. App. B-10, B-8). At the same time Judge Ritter was "curt" to government counsel on January 16, 1976; at the January 30, 1976, hearing he was "indeed caustic and overbearing" (Pet. App. B-8 to B-9).[12] The court observed that this behavior "might foretell injudicious and partisan conduct at trial" (Pet. App. B-9, B-11).

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[10]Judge Ritter did not respond to the mandamus petition. Four of the six defendants, including petitioner, filed an answer.

[11]Although the case was argued to a panel of three judges, the panel submitted its opinion and order to the rest of the judges of the court, who approved them (Pet. App. B-12).

[12]The court noted that "such displays are not infrequent or uncommon" (Pet. App. B-9).

The court also reflected upon its experience with Judge Ritter in the "horse cases,"[13] where it removed him because of his unwillingness to give the United States a fair and impartial trial (Pet. App. B-10 to B-11). Based upon all the facts of this case and its general knowledge of the judge from prior cases, the court of appeals concluded that "the interests of justice require that the cause be tried by another judge" (Pet. App. B-12).[14]

5. On July 30, 1976, the Judicial Council, on referral from the court of appeals, concluded that there is a reasonable likelihood that Judge Ritter would not try the case impartially. In the interests of justice it ordered that he be replaced by another judge (Pet. App. C-1 to C-2).

ARGUMENT

1. Petitioner has no legal interest in the question whether Judge Ritter or some other judge presides in its criminal trial. It therefore is not entitled to challenge the writ of mandamus issued by the court of appeals. Although petitioner was a party in the mandamus proceedings by virtue of Fed. R. App. P. 21(b), we believe that it lacks standing to raise the arguments it now presents.

Standing requires two distinct showings: that the party allege injury in fact, and that the party be the proper

[13] *United States* v. *Hatahley*, 257 F. 2d 920 (C.A. 10), reversed in part, 351 U.S. 173; *United States* v. *Ritter*, 273 F. 2d 30 (C.A. 10), certiorari denied, 362 U.S. 950.

[14] The court directed that a judge from outside the district of Utah hear the case, because Judge Anderson, the only other district judge in active service in Utah, presided at the trial of a private antitrust suit in which petitioner was a defendant. *Cackling Acres, Inc.* v. *Olson Farms, Inc.*, D. Utah, Civ. No. C-296-71. The court of appeals affirmed that treble damage judgment of $1.7 million. *Cackling Acres, Inc.* v. *Olson Farms, Inc.*, C.A. 10, No. 74-1850, decided August 31, 1976.

proponent of the legal rights asserted. *Singleton* v. *Wulff*, No. 74-1393, decided July 1, 1976. Cf. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, No. 74-1124, decided June 1, 1976. Petitioner fails on both counts.

First, it does not allege that disqualification of Judge Ritter would injure it.[15] It does not contend that only Judge Ritter can give it a fair trial; it does not contend that Judge Winner, Judge Ritter's replacement, will not give it a fair trial. Petitioner may believe that the court of appeals' action is not the proper way to administer justice, but this type of concern is no different from that of any citizen, and "motivation is not a substitute for the actual injury needed * * * ." *Schlesinger* v. *Reservists Committee To Stop The War*, 418 U.S. 208, 226.

Second, petitioner has no legally protected interest in the retention of Judge Ritter.[16] Petitioner is still assured a fair trial before an impartial judge; as it admitted to the court of appeals, it has "no appropriate interest or choice concerning the Judge assigned to these proceedings * * *."[17]

2. The only judgment of which review is sought is "the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on July 14, 1976" (Pet. 1; cf. Pet. 12). Petitioner has not sought

[15] Indeed, the only conceivable injury petitioner could suffer would be through the "loss" of a judge biased in petitioner's favor. That, of course, is not a cognizable legal interest.

[16] This is not to say that nobody has an interest in Judge Ritter's disqualification. Judge Ritter, whom the court of appeals removed and criticized, would be entitled to seek review of the court of appeals' order. Judge Ritter, however, did not appear in the court of appeals and has not sought review in this Court; his time for doing so has expired.

[17] Respondent's Answer, p. 23.

review of the order of the Judicial Council, which was issued on July 30, 1976. A judgment of this Court reversing the Tenth Circuit therefore would avail petitioner nothing, for the Judicial Council's order still would stand.[18]

3. The decision of the court of appeals is correct. It depends upon the facts of this case and the Tenth Circuit's intimate knowledge of the behavior of Judge Ritter, and it does not warrant review by this Court.

The court of appeals, after careful consideration of all circumstances, concluded that there was not a "reasonable likelihood that the cause will be tried with the impartiality that litigants have a right to expect in a United States district court" (Pet. App. B-11). There is ample ground for this determination based upon the impeachment and disability resolutions; Mr. Christensen's role in the State Bar proceedings which led to defeat of the resolutions; Judge Ritter's subsequent deference to Mr. Christensen and curtness to government lawyers; and Judge Ritter's behavior in prior proceedings. In these circumstances the court of appeals' judgment that the interests of justice required the appointment of a new judge was justified. It is entitled to particular deference because of the "familiarity of a court of appeals with the practice of the individual district courts within its circuit" (*Will* v. *United States*, 389 U.S. 90, 105).

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[18] Although petitioner questions the order of the Judicial Council (Pet. 11-12), it cannot be reviewed by certiorari, because 28 U.S.C. 1254 provides for review only of "[c]ases in the courts of appeals." A judicial council is not a court of appeals, and, although it is not clear whether orders of a judicial council are directly reviewable by this Court, it is quite clear that, if they are reviewable, review must be by extraordinary writ. *Chandler* v. *Judicial Council*, 398 U.S. 74, 83 n. 5, 86 n. 7. Petitioner has not sought such a writ, and this is not the sort of extraordinary case that would make its issuance by this Court appropriate.

Petitioner does not dispute the court of appeals' conclusion that Judge Ritter's impartiality might reasonably be questioned. It argues only that the court improperly considered certain matters in deciding to remove the judge. These arguments are unsound.

a. Petitioner argues (Pet. 8-9) that the court of appeals' disqualification of Judge Ritter was not based on "extrajudicial" matters and thus is contrary to *Berger* v. *United States*, 255 U.S. 22, and *United States* v. *Grinnell Corp.*, 384 U.S. 563. This contention misreads both this Court's cases and the court of appeals' decision.

In *Berger* the Court held that "the bias or prejudice which can be urged against a judge must be based upon something other than rulings in the case." 255 U.S. at 31. It went on to hold that the judge's statement about the disloyalty of German-Americans was sufficient to disqualify him in the trial of several Americans of German birth or descent. *Id.* at 28-29, 36. In *Grinnell* the Court held that a judge's statements that the government's case, if proven, would merit stringent relief, were not a basis for disqualification. 384 U.S. at 583. The Court noted that the judge's allegedly biased views came from his reading of the pleadings and depositions, and, citing *Berger*, it wrote that bias "to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *Ibid.*

The court of appeals' decision comports with *Berger* and *Grinnell*. The court did not act on the basis of Judge Ritter's "rulings in the case itself" (Pet. 8). Rather, the court relied on a cluster of facts, all of which may properly be considered: the impeachment and hostile attitude toward government lawyers; the judge's past history of partisan behavior (Pet. App. B-5,

B-10 to B-11). Together, even if not separately, these events were enough to call Judge Ritter's impartiality into reasonable question.

We do not understand petitioner to dispute that the first two factors are extrajudicial. Petitioner does contend that consideration of the judge's behavior toward counsel was erroneous because it encompassed "in-court statements" (Pet. 8). But a court need not close its eyes to the import of judicial statements just because they were made in court. This Court disqualified the judge in *Berger* on the basis of statements made in court. The judge's statements, especially in light of his conduct in other cases, are properly considered in determining whether the judge's impartiality is subject to reasonable question.[19]

b. Petitioner also contends (Pet. 9-10) that bias for or against counsel may not be considered under 28 U.S.C. 455(a), and that the court of appeals' consideration of this matter conflicts with *Davis* v. *Board of School Commissioners of Mobile County*, 517 F. 2d 1044 (C.A. 5), rehearing denied, 521 F. 2d 814, certiorari denied, April 19, 1976 (No. 75-1084). Although the United States believes that both the purposes and the legislative history of 28 U.S.C. 455(a) show that it allows consideration of a judge's attitude toward counsel, there is no need to belabor the point here. The alleged conflict between the circuits is illusory.

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[19]The rule that bias, to be disqualifying, must be extrajudicial in origin does not mean that nothing that happens in the courtroom is relevant. "The judge's behavior during the trial may demonstrate the existence of a personal bias." 13 Wright & Miller, *Federal Practice and Procedure* 353 (1975).

Davis held that an assertion by two parties that a judge had criticized the merits of certain of their lawyers' lawsuits and motions did not constitute grounds for disqualification. The court of appeals relied upon both the absence of extrajudicial bias and the legal insufficiency of bias against an attorney as ground for disqualification. *Davis, supra,* 517 F. 2d at 1050-1052.

Davis concerned the propriety of considering judicial bias *against* an attorney, not bias in his favor. The court reasoned that if bias against an attorney were cause for disqualification, a lawyer who (perhaps intentionally) provoked a judge's hostility would gain a "peremptory challenge" and could "decimate the bench." 517 F. 2d at 1050.

Bias in favor of an attorney produces an entirely different situation, for the challenging party cannot create the conditions that give rise to disqualification. The only potential conflict between *Davis* and the instant case, then, concerns judicial hostility toward a specific attorney.[20] That narrow problem is not presented by this case.

As the court of appeals made clear, its disqualification of Judge Ritter was based on several factors, only one of which was his hostility toward governmental counsel. That hostility was a counterpart to his deference to Mr. Christensen, and both kinds of behavior took place in the context of the resolutions relating to Judge Ritter and Mr. Christensen's role in their defeat. Nothing

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[20]To the extent that petitioner suggests that the Fifth Circuit has taken the position that the test for disqualification under Section 455(a) is identical to that under the older Section 144 (Pet. 9), the suggestion is incorrect. See *Parrish* v. *Board of Commissioners of Alabama State Bar*, 524 F. 2d 98, 103-104 (C.A. 5) (*en banc*).

remotely similar was involved in *Davis*, and there is no reason to believe that the Fifth Circuit, presented with the facts of this case, would have allowed Judge Ritter to continue to preside.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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